IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1213 OF 2004

Shri Maruti Govinda Lembe
(Since deceased), through his
heir and legal representative
Shahaji Maruti Lembe. .. Appellant

Versus

Shri Waman Govinda Lembe & ors. .. Respondents

Shri V.R.Walawalkar with Shri A.J.Kengale for Appellant

Smt. Sujata Mogre for Respondents

CORAM : P.V.KAKADE, J.

DATE : 3RD NOVEMBER, 2004.

P.C.:

1. The appellant-plaintiff has filed this appeal against the judgment and order passed by Addl. District Judge, Satara dated 25th July, 2003 whereby Respondents Civil Appeal was allowed and the Judgment and Decree of the Trial Court dated 19.11.1994 was set aside and

Plaintiff’s Suit was dismissed.

2. I heard the learned counsel for both the sides. Perused the record.

3. The plaintiff had filed the suit for partition of immovable property and possession of his share thereunder. In the course of the dispute the defendants raised issue regarding legitimacy of plaintiff. The learned trial judge came to the conclusion that the plaintiff had proved that he was son of deceased Govinda Raghu Lembe and also it was held that the plaintiff had proved his claim for partition and possession of separate share in the suit property. Appeal was carried to the District Court, Satara. The learned Appellate Court Judge after hearing both the parties came to the conclusion that the plaintiff had failed to prove that he was legitimate son of Govinda and as such it was held that he was not entitled to partition and separation of the suit property and the appeal came to be allowed. Hence the present appeal.

4. At the outset it may be noted that the entire dispute revolved around the issue of legitimacy of

plaintiff. It was the plaintiff's case that he was the legitimate son of deceased Govinda and Janabai. It was also submitted on behalf of the plaintiff that the defendant no.1 was his elder brother and Gayabai was their real sister. The learned Appellate Court Judge after assessing the entire evidence on record came to the conclusion that the evidence was not sufficient to prove the allegation that the plaintiff was legitimate son of Govinda and for want of any evidence to that effect the appeal was allowed and suit came to be dismissed.

5. The learned counsel for the appellant sought to raise a question of law to the effect that in view of the provision of Section 114 of the Indian Evidence Act presumption is in favour of the Legitimacy of the child and therefore, the appellate court should have held that the plaintiff was legitimate son of Govinda and Janabai. On perusal of the entire judgment of the lower appellate court and on perusal of the relevant record it is quite clear that there is absolutely no evidence, except the interested word of the plaintiff, in order to show that the plaintiff was legitimate son of Govinda and Janabai. In my considered view, the presumption contemplated

under Section 114 of the Evidence Act would not come to help to the plaintiff in view of total lack of any evidence to make foundation to raise any presumption. In any case, it is a pure question of fact, which is found to be adjudicated legally and properly by the learned Lower Appellate Court Judge and as such I am of the view that the Lower Appellate Court Judgement do not require any interference. In the case of **KONDIBA DAGADU KADAM VS. SAVITRIBAI SOPAN GUJAR & ORS. AIR 1999 (3) SUPREME COURT 2213**, the apex court has categorically held that where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal. In view of this position I am satisfied that the Lower Appellate Court has come to the right conclusion on the basis of available record and therefore, appeal deserves to be dismissed and stands dismissed in limine.

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